

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

DONNA CAVE, et al.,
Plaintiffs-Appellees,
THE SATANIC TEMPLE, et al.,
Intervenors-Appellees

v.
COLE JESTER, In His Official Capacity as the
Secretary of State of Arkansas,
Defendant - Appellant.

On Appeal from the United States District Court
for the Eastern District of Arkansas
No. 4:18-cv-00342 (Hon. Kristine G. Baker)

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SUMMARY OF THE CASE AND STATEMENT REGARDING ORAL ARGUMENT

When the Arkansas General Assembly passed Act 1231 of 2015 (the “Display Act”), it created a political controversy centered on a quintessentially religious subject—the Ten Commandments. The Display Act mandates that the State place a monument “commemorating the Ten Commandments” on the State Capitol grounds, using a specific, state-sanctioned version of the Ten Commandments. Ark. Code Ann. § 22-3-221 (2025). Christians, Jews, other persons of faith, and non-believers objected to the placement of the monument at public hearings, but despite widespread objections and public controversy, the State installed the monument, which has brought nothing but division to the people of Arkansas.

After extensive review of the record, expert reports, and motions for summary judgment, the district court held the Display Act and resulting Ten Commandments monument unconstitutional under the Establishment Clause. The district court’s decision included application of the appropriate Establishment Clause test, including due consideration for the relevant historical practices and understandings and consideration of the relevant context on the Ten Commandments monument. This Court should affirm.

The Orsi Plaintiffs respectfully request 20 minutes of oral argument.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331 and entered final judgment on March 31, 2026. App. 4008; R. Doc. 346. On April 29, 2026, the Secretary timely appealed, R. Doc. 349, giving this Court jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF ISSUES

1. Do plaintiffs who have experienced direct, unwelcome contact with a government-sponsored religious display have standing to challenge the constitutionality of that display under the Establishment Clause, as this Court has previously held, when no intervening Supreme Court decision has dispensed with that form of standing?

Apposite Authority: *ACLU Nebraska Foundation v. City of Plattsmouth*, 419 F.3d 772 (8th Cir. 2005) (en banc); *Red River Freethinkers v. City of Fargo*, 679 F.3d 1015 (8th Cir. 2012); *United States v. Lucas*, 521 F.3d 861 (8th Cir. 2008); *United States v. Merritt*, 934 F.3d 809 (8th Cir. 2019).

2. Do the Display Act and resulting Ten Commandments monument violate the Establishment Clause when there is neither an established history of the specific practice at issue nor an established history of analogous historical practices supporting this government action, which amounts to a state-sanctioned denominational preference on a quintessentially religious matter?

Apposite Authority: *Stone v. Graham*, 449 U.S. 39 (1980); *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005); *Town of Greece v. Galloway*, 572 U.S. 565 (2014). *New Doe Child #1 v. United States*, 901 F.3d 1015 (8th Cir. 2018).

STATEMENT OF THE CASE

A. The Ten Commandments Display Act

Act 1231 of 2015 (the “Display Act”) was signed into law in April 2015. *See* App. 3873; R. Doc. 345, at 14. “The Display Act mandates that the Arkansas Secretary of State ‘arrange for the placement on the State Capitol grounds of a suitable monument commemorating the Ten Commandments.’” App. 3957; R. Doc. 345, at 98 (quoting Ark. Code Ann. § 22-3-221(b)(1)). “As codified, the Display Act specifies the precise text of the Ten Commandments that is to appear on the Ten Commandments Monument placed on the State Capitol grounds. That text reads as follows:

The Ten Commandments

I AM the LORD thy God.

Thou shalt have no other gods before me.

Thou shalt not make to thyself any graven images.

Thou shalt not take the Name of the Lord thy God in vain.

Remember the Sabbath day, to keep it holy.

Honor thy father and thy mother, that thy days may be long upon the land which the Lord thy God giveth thee.

Thou shalt not kill.

Thou shalt not commit adultery.

Thou shalt not steal.

Thou shalt not bear false witness against thy neighbor.

Thou shalt not covet thy neighbor's house.

Thou shalt not covet thy neighbor's wife, nor his manservant, nor his maidservant, nor his cattle, nor anything that is thy neighbor's."

App. 3873–74; R. Doc. 345, at 14–15 (citing Ark. Code Ann. § 22-3-221).

"According to Senator Rapert, the primary sponsor of the legislation that became the Display Act, the 'God' that is in the prescribed text of the Ten Commandments that appears on the Ten Commandments Monument is the God of the Old Testament who appeared and spoke to Moses as described in the Old Testament Book of Exodus." App. 3874; R. Doc. 345, at 15 (citing App. 3757; R. Doc. 286, at 13).

"Other than the text of the Ten Commandments, the Display Act does not specify any other language that must appear on the face of the monument." App. 3874; R. Doc. 345, at 15 (citing App. 3757; R. Doc. 286, ¶ 52). "Nothing in the Display Act requires that the State of Arkansas provide any explanation about the purpose of the Ten Commandments Monument or the manner in which the Ten Commandments provide the basic principles of the American system of government" *Id.* (citing App. 3757; R. Doc. 286, ¶ 53); *see also* Ark. Code Ann. § 22-3-221. The resulting Ten Commandments monument has no explanatory or contextual wording on it. *See* App. 3932; R. Doc. 345, at 73 ("The only other words that appear on the Ten Commandments Monument besides the text of the

Ten Commandments are: ‘Presented to the People of Arkansas by the American History and Heritage Foundation.’”). The Ten Commandments monument “is isolated from the other monuments on the roughly 40 acres that makes up the State Capitol grounds.” App. 3941; R. Doc. 345, at 82 (citing App. 1452; R. Doc. 260-30, App. 1496; R. Doc. 260-31, at 44, App. 3308; R. Doc. 266-10). “The monument has no visual relationship to any other monument such that the message of other monuments can affect the message of the Ten Commandments.” App. 3941–42; R. Doc. 345, at 82–83.

B. Opposition to the Display Act and religious monument

From the Display Act’s introduction through the ultimate erection of the Ten Commandments monument, the bill sponsor, media, and the public at large have always understood the monument to be religious in nature. Members of the public have consistently opposed the bill on those grounds. The primary sponsor of the Display Act, former State Senator Jason Rapert, wrote in a guest editorial for the *Arkansas Democrat-Gazette*:

I am guilty as charged for supporting the Ten Commandments and write today to take full responsibility for being so bold as to believe that our state and our nation would be better off if people simply honored, followed and adhered to the Ten Commandments given by God Himself to Moses on Mount Sinai.

App. 3878; R. Doc. 345, at 19. After the monument’s erection, Senator Rapert made the following additional statement in a news interview:

When our state took a stand for the Ten Commandments in 2015 . . . and every other time our state takes a stand for something that honors God and the Bible, it definitely sends a signal to everyone in the spiritual realm that Arkansas seeks to honor God and invites his blessing.

App. 3889; R. Doc. 345, at 30.

“The headline of an *Arkansas Democrat-Gazette* article when the Display Act was passed was ‘Bill Passes to display holy rules at Capitol.’” App. 3882; R. Doc. 345, at 23 (citing App. 3785; R. Doc. 287, at 5). “Objections to the placement of the Ten Commandments Monument—as well as statements in support of the monument—were voiced at public hearings. At the hearings, one packet of over three hundred letters in support of the monument, all identical except for the signature, were presented to former Secretary Thurston. The form letter signed by the three hundred supporters all contained language evincing an understanding of the religious nature of the monument.” *Id.* (citing App. 3785–86; R. Doc. 287, at 5–6). “While the Ten Commandments Monument was being considered by the Arts and Grounds Commission Subcommittee, the Secretary of State received a fair amount of mail about the monument, including mail from people who were opposed to the monument.” App. 3883; R. Doc. 345, at 24. “At the public hearings held by the Arts and Grounds Commission Subcommittee, people spoke both for and against the monument.” *Id.* “At one meeting held in December 2016, of the 31 people who spoke about the Ten Commandments Monument, 17 people spoke in

favor of the monument and 14 people spoke against it.” *Id.* “During the time that the Arts and Grounds Commission Subcommittee was considering the Ten Commandments Monument, certain groups threatened litigation if the monument was erected.” *Id.* Ultimately, “[t]he Orsi and Cave plaintiffs brought their lawsuit within one month of the installation of the Ten Commandments Monument on Arkansas State Capitol grounds.” App. 3940; R. Doc. 345, at 81 (distinguishing between the original, destroyed monument and the replacement, which are visually identical).

C. The Orsi Plaintiffs

Anne Orsi, Rabbi Levy, Gale Stewart, and Teresa Gryder are concerned citizens of Arkansas who have regular contact with the Arkansas Capitol grounds for a variety of reasons, have had direct contact with the Ten Commandments monument, and object to the Display Act and monument as violations of their sincerely held beliefs. These individuals sued collectively in an action that was subsequently consolidated with the lawsuit brought by Donna Cave, et. al. *See* App. 3862; R. Doc. 345, at 3. This group is referred to here and in the district court’s opinion as the “Orsi Plaintiffs” and elsewhere in the briefing below as the “Consolidated Plaintiffs.”

Anne Orsi “is an agnostic atheist who objects to the Ten Commandments Monument.” App. 3864; R. Doc. 345, at 5. Ms. Orsi “is a member of the Freedom

from Religion Foundation, American Humanist Association, and Arkansas Society of Freethinkers.” App. 3920; R. Doc. 345, at 61. “Ms. Orsi visits the Arkansas State Capitol grounds for many purposes,” including attending rallies, going to the History Commission in the “Big Mac” building to do historical and genealogy research, going to the solstice display on the median south of the Capitol building to celebrate the solstice, going to the Justice Building to file papers and attend meetings, and to testify at legislative committee meetings.” App. 3864–65; R. Doc. 345, at 5–6. “Ms. Orsi has walked past the monument and driven past the monument.” App. 3865; R. Doc. 345, at 6.

Rabbi Eugene Levy is a Jewish Rabbi who opposes the Ten Commandments monument. *See* App. 3865; R. Doc. 345, at 6. “Rabbi Levy estimates that he has been to the Arkansas State Capitol grounds 25 or 30 times,” for “political meetings, rallies, and meetings of the State Board of Education.” *Id.*

Gale Stewart is an ordained elder in the Presbyterian Church, U.S.A. who has seen, and opposes, the Ten Commandments monument. *See* App. 3866; R. Doc. 345, at 7. “Ms. Stewart has made many visits to the Arkansas State Capitol grounds, to picnic, to visit the Supreme Court library, to attend court proceedings, to go to public meetings, and to lobby for passage or failure of proposed legislation. *Id.* She “had been in and out of the Secretary of State’s office doing research when it was on the State Capitol grounds; she has been to the Governor’s

office, to Game and Fish, and to many state agencies.” *Id.* She “has been to rallies and demonstrations” and “has been to the Capitol grounds to see the tulip trees.”

Id.

Teresa Gryder “is a Wiccan who opposes the Ten Commandments Monument.” *Id.* “Ms. Gryder is a member of the Arkansas Society of Freethinkers.” *Id.* She “has been to the State Capitol grounds a lot,” *id.*, to visit the Firefighters memorial, drive through the grounds with her family, and when she applied for a job at the Parks Department. *See id.*

“Ms. Orsi, Ms. Stewart, Rabbi Levy, and Ms. Gryder each learned of the proposed Ten Commandments Monument in connection with reports of the General Assembly’s consideration of legislation authorizing it.” App. 3895; R. Doc. 345, at 36. “The Orsi Plaintiffs each opposed the proposed monument, in part, because they believed it was inconsistent with the separation of church and state; their opposition also had other bases. Ms. Orsi, Ms. Stewart, Rabbi Levy, and Ms. Gryder agree that some of their interactions with the Ten Commandments monument were for the purpose of seeing it, but each also have had other interactions with the monument based on record evidence.” *Id.* “The Orsi plaintiffs’ regular contact with the State Capitol grounds demonstrates that it is reasonably certain that the Orsi plaintiffs will come into direct contact with the Ten Commandments Monument in the future.” App. 3910–11; R. Doc. 345, at 51–52.

SUMMARY OF THE ARGUMENT

On standing, the State does not dispute that the Orsi Plaintiffs have had, and will continue to have, direct unwelcome contact with the Ten Commandments monument. Under this Court’s binding *en banc* decision in *ACLU Nebraska Foundation v. City of Plattsmouth*, those facts are sufficient to satisfy the Article III standing requirements.

On the merits, the district court correctly concluded that the Display Act and the Ten Commandments monument violate the Establishment Clause. Under the two-step “historical practices and understandings” test there is no established history supporting the specific practice at issue—neither laws ratifying the Ten Commandments nor monuments commemorating them—and no other relevant historical practices that support the challenged practice. There is no additional requirement or standalone test requiring the challenged practice to fit within an enumerated list of historical “hallmarks,” and even if there were, denominational preference—government interference in the competition between sects—remains the “clearest command of the Establishment Clause.” Lastly, because no context mitigates the quintessentially religious nature of the monument or the contentious history of the Display Act, both are distinguishable from *Van Orden* and *Plattsmouth* and both should be struck down as unconstitutional, just like the Ten Commandments displays at issue in *McCreary*.

ARGUMENT

I. THE ORSI PLAINTIFFS HAVE STANDING.

The Orsi Plaintiffs¹ are a group of concerned citizens of Arkansas who object to the Display Act as a violation of their sincerely held beliefs. Each of these plaintiffs demonstrated that they have repeatedly visited the Arkansas Capitol and Capitol grounds for a variety of reasons, both before and after the Ten Commandments monument was installed and have had direct, unwelcome contact with the monument due to some of those visits. The district court correctly held that the Orsi Plaintiffs have standing to challenge the Display Act and monument, due to their direct, unwelcome contact with the monument, *see* App. 3907–09; R. Doc. 345, at 48–50, which makes it “reasonably certain that the Orsi plaintiffs will come into direct contact with the Ten Commandments Monument in the future.” App. 3911; R. Doc. 345, at 52. Moreover, their encounters with the monument were not manufactured for the purposes of the case. *See* App. 3909–11; R. Doc. 345, at 50–52. On appeal, the State does not dispute the district court’s conclusions

¹ In addition to Anne Orsi, Rabbi Levy, Gale Stewart, and Teresa Gryder, the “Orsi Plaintiffs” also include three organizations: the American Humanist Association, the Freedom from Religion Foundation, and the Arkansas Society of Freethinkers. The organizations’ standing is premised on associational standing, which the district court found. *See* App. 3920; R. Doc. 345, at 61. The State has not challenged this holding on appeal, and thus, these organizations are not discussed further.

regarding the Orsi Plaintiffs’ standing, save for the legal conclusion that their direct unwelcome contact with the monument is a sufficient “injury in fact” to confer standing. The State’s argument on appeal must be rejected.

The State begins its standing argument by acknowledging that this Court “has held offensive contact with a monument can be sufficient for Establishment Clause standing.” Appellant’s Br. 23 (citing *Red River Freethinkers v. City of Fargo*, 679 F.3d 1015, 1024 (8th Cir. 2012)). The State likens this type of direct unwelcome contact to the “psychological consequence presumably produced by observation of conduct with which one disagrees” that was found insufficient to confer standing in *Valley Forge. Id.* (citing *Valley Forge Christian College v. Ams. United for Separation of Church & State*, 454 U.S. 464, 485–86 (1982)). It then claims that standing based upon “offensive contact” has been “cast into doubt,” *id.*, and that this Court “may reconsider a prior panel’s decision if a supervening Supreme Court decision ‘undermines or casts doubt on the earlier panel decision.’” *Id.* (quoting *United States v. Villareal-Amarillas*, 562 F.3d 892, 898 n.4 (8th Cir. 2009)).

There are two immediate, fatal problems with the State’s “cast-into-doubt” argument. First, the State has failed to cite any authority that would allow a panel of this Court to reconsider a prior decision that was made by this Court *en banc*. And that is precisely what the State is asking this three-judge panel to do. Second,

there is no newly binding Supreme Court precedent that calls into question the type of standing at the heart of this case. Therefore, even if a three-judge panel of this Court had the power to overturn an *en banc* decision—which it does not—there is no intervening Supreme Court decision sufficient to trigger the “cast-into-doubt” standard in the first place.

“A panel of this court may not overrule a decision of the en banc court; only the en banc court may overrule prior circuit precedent.” *U.S. v. Lucas*, 521 F.3d 861, 867 (8th Cir. 2008); *see also U.S. v. Merritt*, 934 F.3d 809, 811 (8th Cir. 2019) (“Our panel may not overrule a decision of the en banc court.”). In order to overturn this Court’s rulings regarding standing based on direct unwelcome contact, the State must not only contend with the three-judge-panel decision in *Red River Freethinkers*, 679 F.3d at 1024, it must also contend with this Court’s *en banc* decision in *ACLU Nebraska Foundation v. City of Plattsmouth*, 419 F.3d 772 (8th Cir. 2005), which expressly determined that the individual plaintiff in that case had standing based upon direct unwelcome contact with a Ten Commandments monument. This Court, sitting *en banc*, wrote “[b]ecause we have an independent duty to make sure that we have jurisdiction over the case, we have studied the question and now affirm the District Court’s conclusion that Doe and the ACLU have standing, adopting the reasoning of the panel opinion on this point.” 419 F.3d at 775 n.4 (en banc) (citing *ACLU Neb. Found. v. Plattsmouth*,

358 F.3d 1020, 1026–31 (8th Cir. 2004) (panel decision)). The panel’s ruling regarding standing was predicated solely on the fact that “Doe has direct personal offensive contact with Plattsmouth’s display of the Ten Commandments and avoids the park because of it.” 358 F.3d at 1027. The Court held, “[t]hese undisputed facts meet the second and third Article III standing requirements of causation and redressability.” *Id.* The Court then turned to Article III’s injury-in-fact requirement and contrasted Doe’s direct unwelcome contact with the plaintiffs in *Valley Forge* who “alleged no injury whatsoever to themselves . . . In fact, they experienced no direct contact with the alleged establishment of religion; they merely objected to the government’s action on principle.” *Id.* at 1029. The Court held:

Doe easily meets *Valley Forge*’s standing test. He does not merely ask the federal courts to declare a governmental action unconstitutional on an academic or ideological principle; Doe is asking the federal courts to stop Plattsmouth’s act because of what it does to him. Doe’s is not the mere vindication of a public grievance, but an allegation of government establishment of religion to which he, personally and directly, has been subjected. Doe has therefore suffered an injury of a nature and to a degree the *Valley Forge* plaintiffs did not.

Id. at 1029. The Court concluded, “Doe’s injuries are concrete in nature, particularized to Doe, actual and ongoing, and not merely conjecture or hypothetical, and therefore judicially recognizable injuries in fact.” *Id.* Again, this Court, sitting *en banc*, affirmed this conclusion regarding standing and “adopt[ed]

the reasoning of the panel opinion on this point.” 419 F.3d at 775 n.4. With respect, that decision cannot be overturned now.

The second fatal flaw in the State’s “cast into doubt” argument is that it requires “a supervening Supreme Court decision” that “undermines or casts doubt on the earlier panel decision.” Appellant’s Br. 23 (quoting *Villareal-Amarillas*, 562 F.3d at 898 n.4). There is no such decision. The State opens its argument with *Valley Forge*, but not only was that decision *contrasted* with direct unwelcome contact by this Court in both *Plattsmouth* and *Red River Freethinkers*, but *Valley Forge* is also a decision from 1982, which means, definitionally, it cannot be “supervening.” The State next points to *Kennedy v. Bremerton School District*, 597 U.S. 507 (2022), as having “created doubt about the correctness of this Court’s and other courts’ offended-observer cases.” Appellant’s Br. 23. The glaring problem with that argument is that the *Kennedy* Court does not discuss standing *at all*, and even if it had, the Petitioner brought only free exercise and free speech claims—not an Establishment Clause claim—such that his standing could not have been predicated on direct unwelcome contact. *See* 597 U.S. at 531–32 (framing analysis as “whether one views the case through the lens of the Free Exercise or Free Speech Clause”). Finally, the State points to Justice Gorsuch’s concurrence in *American Legion v. American Humanist Association*, 588 U.S. 29, 84 (2019), a 2020 article from the Notre Dame Law Review, and another writing by Justice

Gorsuch respecting denial of certiorari in *City of Ocala v. Rojas*, 143 S. Ct. 764, 765 (2023). *See* Appellant’s Br. 23–24. No other Justice joined Justice Gorsuch’s statement respecting the denial of certiorari in *City of Ocala*, in which he principally cites his own concurrence in *American Legion* to support his argument. In turn, only Justice Thomas joined Justice Gorsuch’s concurrence in *American Legion*. *See* 588 U.S. at 79. Neither writing garnered the support of a majority of the Supreme Court and thus, neither writing constitutes an opinion of the Supreme Court sufficient to support the State’s “cast into doubt” argument. The State’s arguments that plaintiffs lack standing because “offended-observer standing violates Article III” must be rejected. Appellant’s Br. 22.

II. THE DISPLAY ACT VIOLATES THE ESTABLISHMENT CLAUSE WHEN EVALUATED AGAINST HISTORICAL PRACTICES AND UNDERSTANDINGS.

The Establishment Clause challenges to Arkansas’s Display Act and Ten Commandments monument are governed by a two-step historical inquiry, with a notable limitation overlaying both parts of the analysis. The first step, as described by Justice Alito, is to take a “modest approach that focuses on the *particular* issue at hand and looks to history for guidance.” *Am. Legion*, 588 U.S. at 60 (Alito, J., plurality op.) (emphasis added); *see also Town of Greece v. Galloway*, 572 U.S. 565, 577 (2014) (“[I]t is not necessary to define the precise boundary of the

Establishment Clause where history shows that the *specific practice* is permitted.”). At step two, when “history has not spoken to the ‘specific practice’ at hand,” the court looks to “the historical understandings of the Establishment Clause as informed by other relevant practices.” *New Doe Child #1 v. United States*, 901 F.3d 1015, 1021 (8th Cir. 2018). And at both steps there is a limitation to the history test: while the “Establishment Clause must be interpreted ‘by reference to historical practices and understandings,’” *Kennedy*, 597 U.S. at 535, that approach “must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation.” *Town of Greece*, 572 U.S. at 576; *see also Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (“Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees . . .”).

The district court applied the correct framework and properly held the Display Act and the monument unconstitutional based on historical practices and understandings. At step one, the district court found that the specific practice at issue in this case, “government mandated placement of a new, stand-alone monument on State Capitol grounds specifying the exact text of the Ten Commandments and ‘commemorating the Ten Commandments’ . . .” App. 3949; R. Doc. 345, at 90 (citing Ark. Code Ann. § 22-3-221), is not historically supported. *See* App. 3848–50; R. Doc. 345, at 89–91. At step two, when

considered within the context of broader historical practices and understandings, the Display Act is constitutionally infirm. Unlike historical practices that amounted to “official acknowledgement . . . of the role of religion in American life,” *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984), the Display Act abuses governmental authority to weigh in on a quintessentially religious matter by ratifying an official version of specific religious doctrine. *See* App. 3951; R. Doc. 345, at 92. The State’s proposed “hallmarks” test, which it raises as an argument for the first time on appeal, is not the law, and even if it were, the Display Act establishes a state-sanctioned denominational preference on a quintessentially religious matter, which the Establishment Clause prohibits. Finally, the district court appropriately distinguished both *Van Orden* and *Plattsmouth* from the present case, where context does not mitigate the Ten Commandments’ unmistakably religious statement. *Van Orden v. Perry*, 545 U.S. 677 (2005). This Court should affirm the district court’s holding.

A. There is no established history supporting the specific practice at issue—neither laws ratifying the Ten Commandments nor monuments commemorating them.

The first step under the history and tradition analysis is straightforward: there is simply no established history of the “specific practice” at issue. *Town of Greece*, 572 U.S. at 577. In *Marsh v. Chambers* the Supreme Court laid out the rationale for analyzing constitutional questions through an historical lens. Looking

at the issue of legislative prayer, the court noted that “there is far more [evidence] here than simply historical patterns,” because “historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress—their actions reveal their intent.” 463 U.S. at 790. Specifically, the Court reasoned:

It can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a Chaplain for each House and also voted to approve the draft of the First Amendment for submission to the States, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable.

Id. In the case of government legislation ratifying the Ten Commandments, “publicly-erected and publicly-owned Ten Commandments monuments lack the historical pedigree of other forms of government religious expression, such as with legislative chaplains.” Expert Report of Dr. Steven Green (hereinafter “Green Report”) App. 0216–17; R. Doc. 254-1, at 4–5 (citing *Marsh*).

The State failed to identify a single Founding-Era example of laws ratifying the Ten Commandments or of government-owned Ten Commandments monuments. Conversely, Plaintiffs, through expert historian Dr. Steven Green, established that “publicly-erected and publicly-owned Ten Commandments monuments lack the historical pedigree of other forms of government religious expression” App. 3950; R. Doc. 345, at 91 (quoting Green Report, App. 0217;

R. Doc. 254-1, at 167). Ten Commandments monuments “are of recent invention,” *id.* (quoting Green Report, App. 0236; R. Doc. 254-1, at 186), with monument designs similar to the one at issue, but “arising in other contexts,” dating only “to the mid-1940s” and with the “actual erection of monuments donated by the Fraternal Order of the Eagles [beginning only in] the mid-1950s.” *Id.* (citing Green Report, App. 0146–56; R. Doc. 254-1, at 96–106).

Arkansas cannot, and did not, point to a longstanding history of legislation or similar government action ratifying the Ten Commandments that even approaches the “unambiguous and unbroken history of more than 200 years” found sufficient to uphold legislative prayer in *Marsh*. 463 U.S. at 792. Such a history simply does not exist. “Ten Commandments monuments are a mid-twentieth century phenomenon,” App. 3893; R. Doc. 345, at 34, that “do not possess ‘a long history’ or ‘a distinctive constitutional warrant by virtue of tradition.’” App. 3950; R. Doc. 345, at 91. Indeed, the design of the Ten Commandments monument upon which the Arkansas monument was based dates back to only the mid-1940s, when a Minnesota juvenile court judge “approached the Minnesota Eagles with the idea of distributing paper copies of the Commandments to be posted in courthouses nationwide.” *Van Orden v. Perry*, 545 U.S. 677, 713 (2005) (Stevens, J., dissenting). Subsequently, “[w]hen Cecil B. DeMille, who at that time was filming the movie *The Ten Commandments*, heard of the judge’s endeavor, he teamed up

with the Eagles to produce the type of granite monolith now displayed in front of the Texas Capitol [and elsewhere].” *Id.* The actual erection of these monuments did not begin until the mid-1950s. *See* Expert Report of Dr. Mark Hall (hereinafter “Hall Report”) App. 0733; R. Doc. 260-3, at 48.

The brief history of these 1950s Ten Commandments monuments fails to shed any light on how the Founders would have viewed them, or the monument at issue here. Even then, the monuments themselves are a step removed from the larger Display Act at the heart of this case—a literal “law respecting an establishment of religion.” U.S. CONST. amend. I. Through the Display Act the State sought to commemorate the Ten Commandments themselves, due to their religious significance, and “nothing about the Ten Commandments Monument commemorates or marks a secular historical event.” App. 3951; R. Doc. 345, at 92. Thus, the district court correctly concluded that the record “does not show that there is a historical foundation for the specific practice at issue in this case in order for it to be permitted under the Establishment Clause.” *Id.*

B. A law ratifying an official version of the Ten Commandments is an archetypical Establishment Clause violation, unsupported by relevant historical practices.

Having established that the State cannot satisfy the first step of the history analysis because the specific practice at issue in this case—ratifying a specific version of one religious doctrine and commemorating it through a permanent,

stand-alone monument—is not historically supported, this Court must turn to the second step: “look[ing] to historical understandings of the Establishment Clause as informed by other relevant practices.” *New Doe Child*, 901 F.3d at 1021 (quoting *Town of Greece*, 572 U.S. at 577). In its first case interpreting the Constitution’s religion clauses, the Supreme Court in *Reynolds v. United States* looked to the allusion used in Thomas Jefferson’s famous letter to the Danbury Baptist Association, where he wrote of “building a wall of separation between church and State.” 98 U.S. 145, 164 (1878) (quoting Letter from Thomas Jefferson to the Danbury Baptist Asso. (Jan. 1, 1802)) (App. 0667; R. Doc. 256-1, at 39). The Court “recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia [S]tatute [for Religious Freedom].” *Everson v. Bd. of Educ.*, 330 U.S. 1, 13 (1947) (citing *Reynolds*, 98 U.S. at 164). The Virginia Statute takes an expansive view on what is considered a religious establishment; it draws a bright line, placing the civil government on one side and all matters of religious interpretation on the other, declaring that ““to suffer the civil magistrate to intrude his powers into the field of opinion . . . is a dangerous fallacy which at once destroys all religious liberty.”” *Reynolds*, 98 U.S. at 164 (quoting the Virginia Bill, 12 Hening’s Stat. 84). Numerous religion clause cases

would follow *Reynolds*, echoing its holding that the philosophy of strict separation was historically rooted and represented the definitive interpretation of the Establishment Clause. *See, e.g., McCollum v. Bd. of Educ.*, 333 U.S. 203, 211 (1948) (“In the words of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between Church and State.’”); *Torcaso v. Watkins*, 367 U.S. 488, 493 (1961) (reaffirming the “wall of separation”). The Court would later summarize its precedent thusly:

The wholesome ‘neutrality’ of which this Court’s cases speak thus **stems from a recognition of the teachings of history** that powerful sects or groups might bring about a fusion of governmental and religious functions . . . to the end that **official support of the State . . . would be placed behind the tenets of one or of all orthodoxies**. This the Establishment Clause prohibits.

Sch Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 222 (1963) (emphasis added).

The Supreme Court has long recognized that “[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, . . . [that] do not confine themselves to arguably secular matters.” *Stone v. Graham*, 449 U.S. 39, 41 (1980); *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 869 (2005) (“[T]he original text viewed in its entirety is an unmistakably religious statement dealing with religious obligations and with morality subject to religious sanction.”). “Rather, the first part of the Commandments concerns the religious duties of

believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day.” *Stone*, 449 U.S. at 42. Therefore, “[w]hen the government initiates an effort to place this statement alone in public view, a religious object is unmistakable.” *McCreary Cnty.*, 545 U.S. at 869. Absent any context that would mitigate the “unmistakable” religious object inherent in a Ten Commandments display—and there is no mitigating context here, *see* Sec. II.D., *infra*—the Display Act must live or die by the historical acceptance, or lack thereof, of similar legislative acts commemorating one religion's specific beliefs. The State failed to identify any analogous history. There is no history of legislation commemorating specific religious beliefs or of legislation seeking to erect standalone monuments to the Ten Commandments on public property.

The State incorrectly contends that “[t]he district court wrongly refused to consider other relevant practices,” Appellant's Br. 41, but this is precisely what the district court did. *See* App. 3949; R. Doc. 345, at 90 (describing the relevant test as considering “whether the practice at issue ‘fits within’ and is ‘consistent with a broader tradition.’” *Town of Greece*, 572 U.S. at 577–78”). The district court specifically considered the historical practices catalogued by the State's expert witness, Dr. Hall, which included:

[A] list of crosses, presumably displayed on public property, that even he admits ‘have often been used to commemorate and honor the dead’ . . . religious references inside the Washington Monument, placed 100 years after the First Amendment was ratified; biblical quotes on three other government buildings, without identifying when those were established or why they are significant; and contemporary monuments, all from the 20th or 21st century, that include minority religious symbols.

App. 3951; R. Doc. 345, at 92 (internal citations omitted). The district court concluded that this “abstract and general history of religious references by government actors or religious references on government property . . . does not support the action taken by the Arkansas General Assembly.” *Id.*

The principal problem with the State’s examples of generalized religious acknowledgements is that none of them are analogous to the practice at issue, which ratifies a specific religion’s doctrine. The State’s assorted examples included cross displays that “took on a secular meaning when they were used as memorials to war veterans.” *Id.*; *see also Am. Legion*, 588 U.S. at 63 (“That the cross originated as a Christian symbol and retains that meaning in many contexts does not change the fact that the symbol took on an added secular meaning when used in World War I memorials.”). The State asks this Court to treat its Ten Commandments monument similarly, arguing that “[i]t doesn’t favor any particular religious denomination over others to commemorate the Ten Commandments’ role in [America’s and Arkansas’s] history.” Appellant’s Br. 44

(internal quotation omitted). But that argument mischaracterizes the nature of the monument and directly conflicts with the district court’s factual findings.

Based on legislative history and the very text of the Display Act, the district court concluded that the State placed the Ten Commandments monument “for the purpose of ‘commemorating the Ten Commandments’ Ark. Code. Ann. § 22-3-221(b), *not* to commemorate the state’s religious heritage or the development of the law.” App. 3943; R. Doc. 345, at 84 (emphasis added); *see also id.* at App. 3951; R. Doc. 345, at 92 (“[N]othing about the Ten Commandments Monument commemorates or marks a secular historical event.”). None of the generalized religious acknowledgments offered up by the State through its expert witness involved the government adopting a specific religious doctrine as an officially recognized version, or commemorating one religion’s specific beliefs for its own sake rather than as a proxy for a broader secular principle. The district court, thus, rightly concluded that “Dr. Hall’s alleged historical analysis does not support the action taken by the Arkansas General Assembly in passing a Display Act that mandates the placement of a new, stand-alone monument on State Capitol grounds specifying the exact text of the Ten Commandments and ‘commemorating the Ten Commandments.’” *Id.*

Dr. Hall’s report identified only one legislative act commemorating the Ten Commandments themselves during the entire 238-year span since the Founders

ratified the Constitution. *See* Hall Report, App. 0730–31; R. Doc. 260-3, at 45–46. The House of Representatives passed that resolution in 1997, as a reaction to a district court decision ordering Alabama Judge Roy Moore to remove a Ten Commandments display from the rotunda of the Alabama State Judicial Building. *See* H.C.R. 31, 105th Cong. (1997). The Eleventh Circuit affirmed the removal order. The display’s setting, the district court found, created an “ineffable but still overwhelming holy aura” that violated the Establishment Clause. *See Glassroth v. Moore*, 335 F.3d 1282, 1297 (11th Cir. 2003). One contemporary resolution, passed in support of a display later held unconstitutional by the Eleventh Circuit, is not a longstanding history or tradition that can support the Display Act.

When viewed in relation to the supposedly analogous practices offered up by the State, the uniquely problematic nature of the Display Act becomes clear: Unlike general acknowledgments of religion that have historically been found permissible, here the State has ratified a specific version of a religious code, elevated that version of the Ten Commandments as the State’s officially codified version, and placed the force and authority of the State behind that religious doctrine by memorializing it in a permanent, stand-alone monument. This is an archetypical religious establishment that echoes the warnings from “the teachings of history” that a powerful sect or group, having acquired some modicum of government power, “might bring about a fusion of governmental and religious

functions . . . to the end that official support of the State . . . would be placed behind the tenets of one or of all orthodoxies.” *Schempp*, 374 U.S. at 222. “This the Establishment Clause prohibits.” *Id.*

C. The “hallmarks” test is not a required element for an Establishment Clause claim.

Arkansas quotes a fragment of the *Kennedy* opinion for the proposition that “Courts must . . . assess[] whether the challenged practice or law implicates the ‘hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment.’ *Kennedy*, 597 U.S. at 536-37[.]” Appellant’s Br. 40. The State doubles down on this alleged rule, further stating that the history and tradition test “*requires* plaintiffs to prove a challenged law or practice resembles the six hallmarks of a religious establishment” Appellant’s Br. 40 (emphasis added) (citing *Shurtleff v. City of Boston*, 596 U.S. 243, 286 (2022) (Gorsuch, J., concurring)). It then admonished the district court for “ignor[ing] *Kennedy*’s instruction to use the hallmarks analysis.” Appellant’s Br. 41. The State’s proposed analytical framework misrepresents the law. *Kennedy* did not adopt the hallmarks as a standalone Establishment Clause test or as a requirement of the history-and-tradition inquiry. The *Shurtleff* concurrence did not make them a requirement either, and it binds no one.

Kennedy cites the list of hallmarks set forth in the *Shurtleff* concurrence in a footnote, does not enumerate them, and refers to the *Shurtleff* concurrence only parenthetically, in passing, as “discussing coercion and certain other historical hallmarks of an established religion.” 597 U.S. at 537 n.5. If the Supreme Court intended to lay down definitive requirements for its history and tradition test it would not do so through a passing parenthetical reference in a footnote. In fact, *Kennedy*’s entire passing mention of the hallmarks is confined to an aside, where the Court is simply noting that the facts before it do not support a coercion claim. The full context for the quote on which the State relies so extensively is as follows:

To be sure this Court has long held that government may not, consistent with a historically sensitive understanding of the Establishment Clause, “make a religious observance compulsory.” *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). Government “may not coerce anyone to attend church,” nor may it force citizens to engage in “a formal religious exercise,” *Lee v. Weisman*, 505 U.S. 577, 589 (1992). No doubt, too, coercion along these lines was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment.

597 U.S. at 536–37 (internal parallel citations omitted). The Court’s attention here is on what it means for the government to engage in impermissible religious coercion, not on the history and tradition test. *Kennedy* falls far short of providing “instruction to use the hallmarks analysis,” as the State claims. Appellant’s Br. 41.

The State’s characterization of *Shurtleff* is equally inaccurate. For one, Justice Gorsuch’s views garnered the support of only one other Justice—Justice Thomas—and thus are not the holding of the case. *See* 596 U.S. at 276. More importantly, the majority opinion in *Shurtleff* is solely confined to analyzing claims brought under the Free Speech Clause of the First Amendment. *See id.* at 247–59. There is no Establishment Clause analysis in *Shurtleff*’s majority holding, let alone a requirement that plaintiffs “prove a challenged law or practice resembles the six hallmarks of a religious establishment,” as the State claims. Appellant’s Br. 40.

The State’s claim that the *Shurtleff* hallmarks are now a required part of the history and tradition analysis is belied by *Catholic Charities Bureau v. Wisconsin Labor & Industrial Review Commission*, 605 U.S. 238 (2025). The *Catholic Charities* Court did not cite *Shurtleff* or *Kennedy*, or mention the list of “hallmarks” found in Justice Gorsuch’s concurrence. Instead, the Court undertook an Establishment Clause analysis where it began by reaffirming that “[t]he clearest command of the Establishment Clause’ is that the government may not ‘officially prefe[r]’ one religious denomination over another.” 605 U.S. at 247 (quoting *Larson v. Valente*, 456 U.S. 228, 245 (1982)). The Court touted the “principle of denominational neutrality” which “bars States from passing laws that ‘aid or oppose’ particular religions,” *id.* (quoting *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968)), or from “interfer[ing] in the ‘competition between sects.’” *Id.* at

248 (quoting *Zorach*, 343 U.S. at 314). The Court then reiterated that “[w]hen a state law establishes a denominational preference, courts must ‘treat the law as suspect’ and apply ‘strict scrutiny in adjudging its constitutionality,’” *id.* at 248 (quoting *Larson*, 456 U.S. at 246), and that the state bore the burden “to show that the relevant law, or application thereof, is “closely fitted to further a compelling governmental interest.” Perhaps most notably, the type of denominational preference that was at issue in *Catholic Charities* and *Larson* (laws that conditioned a benefit on a religious organization’s beliefs or practices) falls outside of the six enumerated hallmarks while simultaneously violating the Establishment Clause’s clearest command.

Ultimately, if anyone should be admonished for failing to “use the hallmarks analysis,” Appellant’s Br. 41, it should be the State, not the district court. The State did not once mention the hallmarks to the district court in its opening brief on summary judgment, *see* R. Doc. 258, or in its response briefing. *See* R. Doc. 285, R. Doc. 295. The State cited to *Shurtleff* only once in the entirety of its briefing, when discussing The Satanic Temple’s Equal Protection claim, and did not mention the Gorsuch concurrence at all. Had *Shurtleff* and *Kennedy* announced a new hallmarks test, as the State now claims, the State would have pointed to that test in its initial briefing, nine months after *Kennedy* was decided and ten months after *Shurtleff*.

If this Court entertains the State’s novel argument, made for the first time on appeal, it should reject that argument because resemblance to a *Shurtleff* hallmark is not what the law requires. And even if it were, *Catholic Charities* demonstrates that denominational preference, “interfer[ing] in the competition between sects,” remains the “clearest command of the Establishment Clause.” 605 U.S. at 247–48. As such, the Display Act would fail even the hallmarks test. It codified the State’s preference for an official version of the Ten Commandments, taking sides on a quintessentially religious matter despite there being “different versions [of the Ten Commandments] recognized by Jews, Roman Catholics, and most Protestant denominations.” App. 3877; R. Doc. 345, at 18. Ultimately, the State’s choice to pass a law codifying an official version of the Ten Commandments and commemorating those religious laws is unsupported by our nation’s history and creates a denominational preference that cannot pass the Establishment Clause’s clear command that the government “make no law respecting an establishment of religion.”

D. The Ten Commandments monument lacks the type of mitigating context found determinative in *Van Orden* and *Plattsmouth*.

The State asserts that the district court “wrongly concluded that the Display Act and monument are unconstitutional under *Van Orden* and *Plattsmouth*.” Appellant’s Br. 34. That is not accurate. *Van Orden* does not constitute a separate,

standalone Establishment Clause test and the district court did not treat it as such. Instead, after a thorough discussion and overview of Establishment Clause precedents, *see* App. 3924–30; R. Doc. 345, at 65–71, the district court correctly asserted that “[t]his case is factually distinguishable from both *Van Orden* and *Plattsmouth*.” App. 3939; R. Doc. 345, at 80. Those cases turned on context, and the context surrounding Arkansas’s monument differs from them in every material respect.

Context matters in Establishment Clause cases. Nothing makes the importance of context more apparent than the fact that *Van Orden* was decided on the same day as *McCreary County v. ACLU of Kentucky*, where the Court struck down two Ten Commandments displays in county courthouses for violating the Establishment Clause. *See* 545 U.S. 844 (June 27, 2005). In *Van Orden*, Justice Breyer, who authored the controlling opinion, called the display a “borderline case.” 545 U.S. at 700 (Breyer, J., concurring).² Justice Breyer’s opinion noted that the legal determination must remain faithful to the religion clauses and “it must take account of context and consequences measured in light of those purposes.”

² Justice Breyer’s opinion in *Van Orden* is controlling. *See Marks v. U.S.*, 430 U.S. 188, 193 (1977) (holding that when a majority of the Justices agree on the outcome of a case but not on the grounds, “the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds”).

545 U.S. at 700 (Breyer, J., concurring). The four-judge plurality agreed on the importance of context, urging that the appropriate constitutional analysis “is driven both by the nature of the monument and by our Nation’s history.” 545 U.S. at 686 (Rehnquist, J., plurality op.). In looking to the context of the *Van Orden* monument, Justice Breyer found that the nonreligious aspects of the monument predominated given “[t]he circumstances surrounding the display’s placement on the capitol grounds and its physical setting.” *Id.* at 701 (Breyer, J., concurring). The group that donated the monument was primarily secular. *Id.* Justice Breyer found a further “determinative factor” to be that 40 years passed before the monument was legally challenged. *Id.* at 702. The obvious distinction between *Van Orden* and *McCreary* was that the latter had a “short (and stormy) history,” which demonstrated “the substantially religious objectives of those who mounted them.” *Id.* at 703.

Subsequent cases have likewise affirmed that context matters when it comes to evaluating government displays under the Establishment Clause. While religious imagery in a secular display may pass constitutional muster, official display of religious symbols to promote religious messages falls squarely within the Establishment Clause’s prohibition. In *Salazar v. Buono*, for instance, the Supreme Court upheld a land-transfer statute designed to preserve the display of a Latin cross on government property due to its history as a war memorial, which

gave the monument a primarily secular character. *See* 559 U.S. 700 (2010) (Kennedy, J., plurality op.) (“Private citizens put the cross on Sunrise Rock to commemorate American servicemen who had died in World War I.”). The Court admonished the district court for taking “insufficient account of the context in which the statute was enacted and the reasons for its passage.” *Id.* at 715. The Court then contrasted the context in *Salazar* to *County of Allegheny*, *see id.*, where all Justices agreed that “the [Establishment] Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall . . . because such an obtrusive year-round religious display would place the government’s weight behind an obvious effort to proselytize on behalf of a particular religion.” *Cnty. of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 606–07 (1989); *see also id.* at 661 (Kennedy, J., concurring in part) (writing same). *American Legion* proceeded in the same way, with the Court deciding whether a memorial cross retained its religious character or had acquired “an added secular meaning” from its setting and context. *See* 588 U.S. at 63.

This emphasis on context, which itself is informed by the passage of time, strongly cuts against the State’s argument in the present case. The State fails to acknowledge the existence of the *McCreary* decision in its opening brief. The State also fails to acknowledge that modern legislative efforts to impart religion on others are factually distinguishable from maintaining decades-old monuments, a

fact that the Supreme Court stated plainly in *American Legion*, where it wrote, “retaining established, religiously expressive monuments, symbols, and practices is quite different from erecting or adopting new ones.” 588 U.S. at 57. Other circuits have recognized this distinction. *See, e.g., Felix v. City of Bloomfield*, 841 F.3d 848, 859 (10th Cir. 2016) (“The Supreme Court decided two separate Ten Commandments cases on the same day with different outcomes, and the ‘determinative’ factor for the different outcomes appeared to be litigation timing.”), *cert. denied*, 138 S.Ct. 357; *ACLU of Ohio Found. v. Deweese*, 633 F.3d 424 (6th Cir. 2011), *cert. denied*, 131 S.Ct. 368; *Green v. Haskell Cnty. Bd. of Comm’rs*, 568 F.3d 784 (10th Cir. 2009), *cert. denied*, 130 S.Ct. 1687; *Glassroth v. Moore*, 335 F.3d at 1300 (11th Cir.), *cert denied*, 124 S.Ct. 497.

In the present case, the relevant context and factual background of the Display Act and Ten Commandments monument are much more closely aligned with *McCreary* than with *Van Orden*. First, unlike in *Van Orden*, where Justice Breyer found it “determinative” that “40 years passed in which the presence of this monument, legally speaking, went unchallenged,” 545 U.S. at 702, or in *Plattsmouth*, where this Court noted “as was the case in *Van Orden*, decades passed during which the Ten Commandments monument stood in Plattsmouth’s Memorial Park without objection,” 419 F.3d at 778, in the present case “[t]he Orsi and Cave plaintiffs brought their lawsuit within one month of the installation of the

Ten Commandments Monument on Arkansas State Capitol grounds.” App. 3940; R. Doc. 345, at 81. Moreover, the Display Act’s history demonstrates that Arkansas’s Ten Commandments monument was highly controversial from that start, specifically because the public, the media, and the bill’s primary sponsor all considered it to be religious in nature. “Objections to the placement of the Ten Commandments Monument—as well as statements in support of the monument—were voiced at public hearings,” App. 3882; R. Doc. 345, at 23, with over three hundred form letters in support “evinced an understanding of the religious nature of the monument,” *id.*, while both the Secretary of State and the Arts and Grounds Commission Subcommittee received letters and public comments in opposition to the monument. *See* App. 3883; R. Doc. 345, at 24. “The headline of an *Arkansas Democrat-Gazette* article when the Display Act was passed was ‘Bill Passes to display holy rules at Capitol.’” App. 3882; R. Doc. 345, at 23. And the primary sponsor of the Display Act, former State Senator Jason Rapert, wrote in a guest editorial for the *Arkansas Democrat-Gazette*: “I am guilty as charged for supporting the Ten Commandments and write today to take full responsibility for being so bold as to believe that our state and our nation would be better off if people simply honored, followed and adhered to the Ten Commandments given by God Himself to Moses on Mount Sinai.” App. 3878; R. Doc. 345, at 19. After the monument’s erection, Senator Rapert made the following additional statement in a

news interview: “When our state took a stand for the Ten Commandments in 2015 . . . and every other time our state takes a stand for something that honors God and the Bible, it definitely sends a signal to everyone in the spiritual realm that Arkansas seeks to honor God and invites his blessing.” App. 3889; R. Doc. 345, at 30. This “stormy history” aligns with the unconstitutional *McCreary* displays, not with the *Van Orden* monument’s 40 years of seeming public acceptance.

Second, the State’s intention in passing the Display Act was to commemorate the Ten Commandments themselves. The State argues, “the reason for Arkansas’s monument is to acknowledge the Ten Commandments’ role as ‘an important component of the moral foundation of the laws and legal system.’” Appellant’s Br. 35 (citing Act 1231 of 2015, § 1(1)). This selective citation—to proposed legislative findings in the original bill that were ultimately omitted from the codified Display Act, *see* App. 3872; R. Doc. 345, at 13—is contradicted by the district court’s factual findings and by the record as a whole. As the district court recognized, “The Display Act mandates that the Arkansas Secretary of State ‘arrange for the placement on the State Capitol grounds of a suitable monument commemorating the Ten Commandments.’” App. 3941; R. Doc. 345, at 82 (citing Ark. Code Ann. § 22-3-221(b)(1)). Thus, the stated intent was not related to history, but was “commemorating the Ten Commandments.” App. 3943; R. Doc. 345, at 84. The Act did not require any text commenting on the law, the legal

system, or the alleged connection between the Ten Commandments and the legal system. *See* App. 3941; R. Doc. 345, at 82, App. 3963; R. Doc. 345, at 104 (“Nothing on the Ten Commandments Monument explains that a purpose of the monument is allegedly to provide basic principles of the American system of government.”). Instead, the Act required a specific full-text version of the Ten Commandments to be displayed on the monument. App. 3941; R. Doc. 345, at 82.

Finally, the district court appropriately identified the significant interaction between religious entities and former State Senator Jason Rapert in the financing, installation, and unveiling of the monument. While the State argues that “donors’ motivations aren’t imputed to the government,” Appellant’s Br. 37, the district court’s inquiry was limited to analyzing the context in which the monument was proposed, designed, and erected; the court did not impute motivations of donors to the government. *See* App. 3937–43; R. Doc. 345, at 78–84. These are appropriate considerations when understanding the context of the Act and the Ten Commandments monument. As the district court concluded:

Based on the undisputed record evidence before the Court, including but not limited to the text and design of the Ten Commandments Monument; its placement on the State Capitol grounds; the circumstances of its installation, financing, and unveiling; and the timing of this litigation, the Court concludes that this case is distinguishable from *Van Orden* and from *Plattsmouth*.

App. 3943; R. Doc. 345, at 84. Thus, the context that made *Van Orden* a borderline case is not present here. The district court appropriately distinguished both *Van Orden* and *Plattsmouth*.

The Display Act is quite literally a “law respecting an establishment of religion,” which violates the “very purpose of a Bill of Rights” which “was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.” *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). Without any context that would mitigate the Ten Commandments monument’s “unmistakably religious statement dealing with religious obligations and with morality subject to religious sanction,” *McCreary*, 545 U.S. at 869, the “short (and stormy) history” of the Display Act mirrors that of the displays struck down in *McCreary*. *Van Orden*, 545 U.S. at 703. Arkansas’s monument commemorating the Ten Commandments should likewise be held unconstitutional.

CONCLUSION

For these reasons, this Court should affirm the grant of the Orsi Plaintiffs’ summary judgment motion and denial of the State’s summary judgment motion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 9,401 words, excluding the parts exempted by Fed. R. App. P. 32(f).

I also certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5)-(6) because it has been prepared in 14-point proportionally spaced font, using Microsoft Word.

Dated: October 7, 2026

/s/ Samuel T. Grover

CERTIFICATE OF SERVICE

I certify that on October 7, 2026, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Samuel T. Grover